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MANGALESWARY PONNAMPALAM v. GIRITHARAN E RAJARATNAM

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
AHMADI ASNAWI JCA
B ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: A-09-215-08-2014]
19 JUNE 2015

C ***FAMILY LAW:*** *Orders for protection – Domestic violence – Interim protection order ('IPO') – Setting aside – Application for – Magistrate's decision affirmed by High Court – Appeal against – Whether IPO could still be in force when parties were divorced and living separately – Whether IPO was temporary order – Whether application to set aside filed out of time – Whether medical report produced by appellant – Whether police investigation completed – Whether appellant bears* D *burden to satisfy court that IPO should be allowed to remain – Whether Magistrate's decision in setting aside IPO valid – Whether respondent prejudiced – Domestic Violence Act 1994, ss. 4(1), 4(4) & 12B*

An interim protection order ('IPO') was granted following a police report lodged by the appellant against the respondent. The appellant alleged, among E others, that the respondent had assaulted her. At the time the IPO was issued, both parties were in the process of a divorce and lived together in their matrimonial home. The respondent's application to set aside the IPO was granted by the Magistrate on the basis that (i) it would be unfair to keep the respondent waiting for the completion of the police investigation; and (ii) the F appellant could avoid injury as she was living separately from the respondent. Dissatisfied, the appellant appealed against the decision of the Magistrate. The High Court, however, affirmed the said decision. *Vide* this appeal, the appellant sought for, *inter alia*, an order that the IPO be reinstated and the matter be left to the police to complete the investigation. At the time G this appeal came up for hearing, the parties were already divorced. Therefore, it was argued that the appeal had become purely academic since the parties were living separately and the appellant did not need further protection under the Domestic Violence Act 1994 ('the Act'). Further, it was submitted, *inter alia*, that (i) the Magistrate's decision to set aside the IPO was *ultra vires* s. 4(4) of the Act; (ii) so long as the police investigation had not H been completed and neither had any criminal proceedings been instituted against the respondent, the IPO remained in force and the court was powerless to set it aside; (iii) the application to set aside the IPO was filed out of time and the respondent did not apply for extension of time; (iv) the Magistrate fell into error in placing the burden on the appellant in relation I to producing the medical report and to ensure that the police investigation was completed; and (v) there was no harm in allowing the IPO to remain in force as it merely restrained the respondent from further abusing the appellant. On the other hand, the respondent contended, *inter alia*, that the

appellant should have applied for the hearing in the Magistrate's Court to be made *inter partes* and her failure to do so had prejudiced him since he was not given an opportunity to ventilate his case before the IPO was extended beyond 21 days. It was submitted that since an IPO was a form of interim injunction obtained by way of an *ex parte* application, O. 29(2A) and O. 29(2B) of the Rules of Court 2012 ('ROC') would take effect.

Held (dismissing appeal)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) Section 4(1) of the Act includes a 'former spouse'. As such, an IPO can still be in force even where the parties are divorced and living separately. Sub-section 4(4) of the Act sets out the circumstances in which an IPO ceases to have effect. On the other hand, s. 12B provides the mechanism for the person against whom an IPO was issued to apply, within 14 days of the service of the order, to set it aside. Section 12B stands on its own and is not subjugated to sub-s. 4(4). There is nothing in s. 12B that can be construed as prohibiting an application to be made and for the court to make the order sought, during the pendency of a police investigation. In fact, the application could be made immediately upon service of the IPO. (paras 13, 18 & 19)

(2) There can be no hard and fast rule as to what in law amounts to a valid reason in an application for setting aside under s. 12B of the Act. However, the second reason given by the Magistrate, *ie*, that the appellant could avoid injury as she was living separately from the respondent could not be a valid reason and was irrelevant in considering whether the IPO should be set aside. A person can still commit an act of domestic violence against his or her former spouse even after divorce. (paras 26 & 27)

(3) The respondent had already explained about the delay in relation to the filing of the application to set aside the IPO by way of an affidavit and the Magistrate accepted his explanation. It was entirely for the Magistrate to decide whether to accept or reject the explanation and this court had no reason to interfere with that decision. By proceeding to hear the application to its final conclusion, the Magistrate must have granted the respondent abridgement of time to file the application. As such, it was not wrong for the Magistrate to entertain the application although it was filed out of time. (paras 23 & 24)

(4) In an application to set aside an IPO under s. 12B of the Act, a Magistrate is vested with wide discretion whether to allow or disallow the application. An IPO by its very nature carries with it a stigma that the person against whom the order is made is a violent person although the truth or otherwise of the police report leading to its issuance has yet to be established. On the facts, the police report was lodged on 30 August 2012. Yet, eight months later when the case came up for hearing before the Magistrate on 30 April 2013, there was still no news

about the outcome of the police investigation. In fact, it had not been shown that the police had carried out any investigation into the report and if so, what was the stage of the investigation. Further, a proceeding under s. 12B of the Act is strictly a private matter between two private individuals in a domestic dispute. Hence, if any other party wishes to take part in the proceedings, it is up to the party concerned to apply for a joinder. It was not the duty of the applicant to do so. (paras 25, 31, 32 & 47)

(5) As a complainant, the appellant had every right to obtain information about the police investigation, more so when the information was required for the purpose of the present proceedings. The respondent, however, did not have the same privilege, being the target of the criminal investigation and a potential accused. Having regard to the ordinary course of human affairs, it was fair to assume that the respondent had been made to suffer the indignity of being labelled as a violent man although there was, as yet, no criminal charge filed against him for the assault allegedly committed. Further, an investigation into an offence punishable under s. 323 of the Penal Code should not take such a long time to complete if the police report lodged by the appellant contained the truth. (paras 33-35)

(6) The burden was on the appellant to satisfy the court as to why the interim order should be allowed to remain. Neither the medical report nor the affidavit of the medical officer was produced by the appellant to at least give some form of assurance to the Magistrate that there was basis to further investigate the matter. The affidavit of the investigating officer could have been produced by the appellant, not to prove the alleged offence but for, *inter alia*, the limited purpose of confirming whether the investigation had been completed. Even if that was not possible, the appellant herself could still affirm those facts in her affidavit after consulting the police. However, none of these were done. (paras 37-39)

(7) The standard operating procedure would be for the police to send a complainant in a physical assault case to the hospital for medical examination and not for the complainant to do so on her own without being accompanied by any police officer. The independence and integrity of the investigation would be compromised if a complainant was allowed to gather evidence by herself. On the facts, it had not been explained as to why the appellant had gone to the hospital by herself and not accompanied by any police officer, given that her police report contained an allegation of a criminal act against the respondent. (paras 40-42)

(8) An IPO is a temporary order and is not meant to be permanent. In any event, even without the protection accorded by the IPO, there are other laws that can provide adequate protection to the appellant. One such law

is the Penal Code itself. It will be a criminal offence under the Penal Code if the respondent were to commit any violent act or threat of violence against the appellant. If that were to happen, the appellant was at liberty to lodge a fresh police report against the respondent. (paras 43 & 45)

(9) Once issued, an IPO must be served personally on the person named in the order and will only take effect upon proper service. Once served, the person against whom the order is issued can then apply to set it aside within 14 days of service. This procedure provides effective safeguard against abuse of s. 4(1) of the Act. For all practical purposes, it is similar to the safeguard provided by O. 29(2B) of the ROC except that it is for the person against whom the order is issued to make the application to set it aside. Since the safeguard was already in place, it could not be seen how the appellant's failure to apply for hearing in the Magistrate's Court to be made *inter partes* had prejudiced the respondent. After being served with the IPO, the respondent applied to set aside the order and succeeded in both in the Magistrate's Court and in the High Court. As such, there was no prejudice that had occasioned due to the appellant's failure to apply for the hearing to be made *inter partes*. (paras 53 & 54)

(10) After considering the respondent's application and the appellant's opposition, the Magistrate decided that the IPO should be set aside. The Magistrate's error in finding that the IPO was no longer needed because the appellant could avoid injury as she was living separately from the respondent was not such a manifest error as to render the whole of the judgment defective and liable to be set aside. (paras 56 & 57)

Bahasa Malaysia *Translation Of Headnotes*

Satu perintah perlindungan interim ('IPO') telah diberikan berikutan laporan polis yang dibuat oleh perayu terhadap responden. Perayu menyatakan, antara lain, bahawa responden telah menyerangnya. Pada masa IPO dikeluarkan, kedua-dua pihak sedang dalam proses bercerai dan tinggal bersama-sama di rumah mereka. Permohonan responden untuk mengenepikan IPO telah dibenarkan oleh Majistret atas alasan bahawa (i) tidak adil untuk menyebabkan responden menunggu sehingga penyelesaian siasatan polis; dan (ii) perayu tidak boleh dicederakan memandangkan dia kini tinggal berasingan daripada responden. Tidak berpuas hati, perayu merayu terhadap keputusan Majistret. Mahkamah Tinggi, walau bagaimanapun, mengesahkan keputusan tersebut. Melalui rayuan ini, perayu menuntut, antara lain, perintah supaya IPO dihidupkan semula dan perkara ini dikendalikan oleh pihak polis untuk menyelesaikan siasatan. Pada masa rayuan ini didengar, pihak-pihak telah pun bercerai. Oleh itu, dihujahkan bahawa rayuan ini telah menjadi akademik memandangkan pihak-pihak tinggal berasingan dan perayu tidak memerlukan perlindungan lanjut di bawah Akta Keganasan Rumah Tangga 1994 ('Akta'). Selanjutnya, dihujahkan lagi, antara lain, bahawa (i) keputusan Majistret untuk mengenepikan IPO adalah *ultra*

vires s. 4(4) Akta; (ii) selagi siasatan polis tidak diselesaikan dan sebarang prosiding jenayah tidak dimulakan terhadap responden, IPO masih berkuatkuasa dan mahkamah tidak mempunyai kuasa untuk mengenepikannya; (iii) permohonan untuk mengenepikan IPO difailkan di luar had masa dan responden tidak memohon untuk pelanjutan masa; (iv) Majistret tersilap apabila meletakkan beban ke atas perayu untuk mengemukakan laporan perubatan dan memastikan bahawa siasatan polis telah diselesaikan; dan (v) tiada sebarang kemudaratan akan disebabkan apabila IPO berkuatkuasa memandangkan ianya hanya menghalang responden daripada terus mendera perayu. Sebaliknya, responden menghujahkan, antara lain, bahawa perayu sepatutnya memohon supaya perbicaraan di Makamah Majistret dijalankan secara *inter partes* dan kegagalan ini telah memprejudiskannya memandangkan dia tidak diberikan peluang untuk membentangkan kesnya sebelum IPO dilanjutkan melebihi 21 hari. Dihujahkan bahawa memandangkan IPO merupakan sejenis injunksi interim yang diperolehi melalui permohonan *ex parte*, A. 29(2A) dan A. 29(2B) Kaedah-Kaedah Mahkamah 2012 ('KKM') terpakai.

Diputuskan (menolak rayuan)
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 4(1) Akta merangkumi 'bekas isteri atau suami'. Oleh itu, IPO masih boleh dikuatkuasakan walaupun pihak-pihak sudah bercerai dan tinggal berasingan. Sub-seksyen 4(4) Akta memperuntukkan keadaan di mana IPO tamat berkuatkuasa. Sebaliknya, s. 12B memperuntukkan mekanisma bagi orang yang terhadapnya IPO dikeluarkan untuk memohon, dalam masa 14 hari dari tarikh perintah tersebut disampaikan, untuk mengenepikannya. Seksyen 12B berdiri dengan sendirinya dan tidak bergantung kepada sub-s. 4(4). Tiada apa-apa Akta dalam s. 12B yang boleh ditafsirkan sebagai menghalang sesuatu permohonan untuk dibuat dan untuk mahkamah membuat perintah yang dipohon, semasa siasatan polis masih belum diselesaikan. Sebenarnya, permohonan itu boleh dibuat sebaik sahaja IPO disampaikan.

(2) Tiada sebarang peraturan ketat tentang apa yang terjumlah kepada alasan sah dalam suatu permohonan pengenepian di bawah s. 12B Akta. Walau bagaimanapun, alasan kedua yang diberi oleh Majistret, iaitu, bahawa perayu boleh mengelak daripada dicedera memandangkan dia tinggal berasingan daripada responden bukanlah suatu alasan sah dan tidak mempunyai kaitan semasa mempertimbangkan sama ada IPO perlu diketepikan. Seseorang masih boleh melakukan keganasan rumah tangga terhadap bekas suami atau isterinya walaupun selepas penceraian.

(3) Responden telah pun memberi penjelasan mengenai kelewatan memfailkan permohonan untuk mengenepikan IPO melalui afidavit dan Majistret telah pun menerima penjelasannya. Terpulang kepada Majistret sama ada untuk menerima atau menolak penjelasan tersebut dan mahkamah ini tidak mempunyai alasan untuk campur tangan dalam

keputusan tersebut. Dengan mendengar permohonan tersebut sehingga keputusan diberikan, Majistret telah pun membenarkan perlanjutan masa kepada responden untuk memfailkan permohonan tersebut. Oleh itu, adalah tidak salah untuk Majistret mendengar permohonan tersebut walaupun difailkan di luar had masa.

(4) Dalam suatu permohonan untuk mengenepikan IPO di bawah s. 12B Akta, Majistret diberikan budi bicara luas sama ada untuk membenarkan atau menolak permohonan tersebut. IPO memberi kesan stigma bahawa seseorang itu adalah ganas walaupun kebenaran laporan polis yang menyebabkan pengeluarannya masih belum dibuktikan. Berdasarkan fakta, laporan polis dibuat pada 30 Ogos 2012. Walaupun selepas lapan bulan kemudian apabila kes didengar oleh Majistret pada 30 April 2013, masih tiada perkembangan berkenaan hasil siasatan polis. Sebenarnya, tiada apa-apa ditunjukkan bahawa pihak polis telah menjalankan siasatan berkenaan laporan tersebut dan di peringkat manakah siasatan tersebut berada. Tambahan lagi, suatu prosiding di bawah s. 12B adalah perkara peribadi antara dua individu dalam pertikaian rumah tangga. Oleh itu, jika pihak lain mempunyai niat untuk mengambil bahagian dalam prosiding tersebut, adalah terpulang kepada pihak tersebut untuk membuat permohonan supaya dicantumkan. Pemohon tidak mempunyai tanggungjawab untuk berbuat demikian.

(5) Sebagai pengadu, perayu mempunyai hak untuk memperolehi maklumat berkenaan siasatan polis, lagi pun apabila maklumat diperlukan bagi kehendak prosiding ini. Responden, walau bagaimanapun, tidak mempunyai keistimewaan yang sama, merupakan sasaran siasatan jenayah dan berpotensi untuk menjadi seorang tertuduh. Mengambil kira perjalanan biasa urusan manusia, adalah adil untuk menganggap bahawa responden telah mengalami penghinaan dengan dilabel sebagai lelaki yang ganas walaupun tiada tuduhan jenayah difailkan terhadap beliau untuk serangan yang kononnya dilakukan olehnya. Selanjutnya, siasatan untuk kesalahan yang boleh dihukum di bawah s. 323 Kanun Keseksaan tidak boleh mangambil masa yang lama untuk diselesaikan jika laporan polis yang dibuat oleh perayu mengandungi kebenaran.

(6) Beban terletak pada perayu untuk memuaskan mahkamah bahawa perintah interim perlu dikekalkan. Laporan perubatan dan afidavit pegawai perubatan tidak dikemukakan oleh perayu untuk sekurang-kurangnya memberi keyakinan kepada Majistret bahawa terdapat alasan untuk menyiasat perkara itu dengan lebih lanjut. Afidavit pegawai penyiasat sepatutnya dikemukakan oleh perayu, bukan untuk membuktikan kesalahan malah untuk, antara lain, mengesahkan sama ada siasatan telah diselesaikan. Jika tidak mempunyai kemungkinan untuk berbuat demikian, perayu sendiri boleh mengesahkan fakta-fakta tersebut di dalam afidavitnya selepas berbincang dengan pihak polis. Walau bagaimanapun, kesemua perkara ini tidak dilakukan.

(7) Dalam kes serangan fizikal, prosedur operasi standard adalah di mana polis akan menghantar pengadu ke hospital untuk pemeriksaan perubatan dan bukannya untuk pengadu berbuat demikian tanpa ditemani oleh pihak polis. Kebebasan dan integriti siasatan akan dikompromi jika pengadu dengan sendiri dibenarkan untuk mengumpul keterangan. Berdasarkan fakta, tiada keterangan diberi mengenai mengapa perayu telah pergi ke hospital dengan sendiri tanpa ditemani oleh pegawai polis, memandangkan laporannya mengandungi tuduhan perbuatan jenayah terhadap responden.

(8) IPO adalah perintah sementara dan tidak dimaksudkan untuk dijadikan tetap. Dalam apa jua keadaan, walaupun tanpa perlindungan yang diberi oleh IPO, terdapat undang-undang lain yang boleh memberi perlindungan yang mencukupi kepada perayu. Kanun Keseksaan merupakan satu-satunya undang-undang sebegitu. Ia merupakan kesalahan jenayah di bawah Kanun Keseksaan jika responden melakukan keganasan atau mengugut perayu. Jika ia berlaku, perayu mempunyai kebebasan untuk membuat laporan polis baru terhadap responden.

(9) Selepas dikeluarkan, IPO mesti disampaikan secara kendiri kepada orang yang dinamakan dalam perintah tersebut dan hanya akan berkuatkuasa apabila penyampaian disempurnakan. Setelah disampaikan, orang di mana perintah itu dibuat terhadapnya mempunyai 14 hari dari tarikh penyampaian untuk mengenepikannya. Prosedur ini memberi perlindungan daripada penyalahgunaan s. 4(1) Akta. Ia adalah sama seperti perlindungan yang diberi oleh A. 29(2B) KKM kecuali ia adalah untuk sesiapa perintah itu dibuat terhadapnya untuk membuat permohonan mengenepikannya. Memandangkan perlindungan ini adalah sedia ada, ia tidak boleh dilihat bagaimana kegagalan perayu untuk memohon pendengaran di Mahkamah Majistret untuk dijadikan *inter partes* telah memprejudiskan responden. Selepas diserahkan dengan IPO, responden telah memohon untuk mengenepikan perintah tersebut dan berjaya di Mahkamah Majistret dan Mahkamah Tinggi. Oleh itu, tiada prejudis disebabkan atas alasan kegagalan perayu untuk memohon supaya pendengaran dijadikan *inter partes*.

(10) Setelah mempertimbangkan permohonan responden dan bantahan perayu, Majistret telah memutuskan supaya IPO diketepikan. Kesilapan Majistret memutuskan bahawa IPO tidak diperlukan lagi atas alasan bahawa perayu boleh mengelak daripada dicederakan memandangkan dia tinggal berasingan daripada responden bukanlah satu kegagalan nyata yang boleh menyebabkan keseluruhan penghakiman itu cacat dan layak diketepikan.

Case(s) referred to:

Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor [1978] 1 MLRA 504 ***(refd)***

Eng Mee Yong & Ors v. V Letchumanan [1979] 2 MLJ 212 ***(refd)***

Howard v. Pickford Tool Co Ltd [1951] 1 KB 417 ***(refd)***

Legislation referred to:
Domestic Violence Act 1994, ss. 2, 4(1), (4), 5, 6(2), 12B
Penal Code, ss. 321, 323
Rules of Court 2012, O. 1 r. 2(2), O. 29(2B), (2BA)

For the appellant - YN Foo (Khiran Dhaliwal with her); M/s YN Foo & Partners.
For the respondent - Awtar Kaur; M/s KL Choy & Co
Watching brief:
Jasmee Hameeza Jaafar, DPP for AG's Chambers
Honey Tan for the Malaysian Bar
Meera Samanther (Quah Su Enn with her) for:
(i) Association of Women Lawyers
(ii) Women's Aid Organisation
(iii) Women's Centre For Change (Penang)
(iv) All Women's Action Society
(v) Persatuan Kesedaran Komuniti Selangor
(vi) Sisters in Islam

[Appeal from High Court, Ipoh; Criminal Appeal No. M2 41S-18-05-2013]

Reported by Kumitha Abd Majid

JUDGMENT

Abdul Rahman Sebli JCA:

The Appeal

[1] This appeal is against the decision of the Ipoh High Court upholding the decision of the learned Magistrate setting aside the Interim Protection Order ("the IPO") granted to the appellant on 5 September 2012. The appellant is now asking for an order that the IPO be reinstated and the matter be left to the police to complete the investigation and a decision made by the Public Prosecutor whether to charge the respondent for voluntarily causing hurt to the appellant, an offence under s. 321 and punishable under s. 323 of the Penal Code.

[2] The IPO was granted following a police report lodged by the appellant against the respondent, a medical doctor, alleging assault at 11.30pm on 29 August 2012 and at 8am on 30 August 2012. Amongst others, she alleged that the respondent shouted at her, hit her with his shoes and threatened to beat her up if she dared to go against him.

Domestic Violence

[3] Section 2 of the Domestic Violence Act 1994 ("the DVA") defines 'domestic violence' to mean the commission by a person, whether by himself or through a third party, of one or more of the following acts against his or her spouse, his or her former spouse, a child, an incapacitated adult, or any member of the family:

(a) wilfully or knowingly placing, or attempting to place, the victim in fear of physical injury;

(b) causing physical injury to the victim by such act which is known or ought to have been known would result in physical injury;

(c) compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain;

(d) confining or detaining the victim against the victim's will;

(e) causing mischief or destruction or damage to property with the intent to cause or knowing that it is likely to cause distress or annoyance to the victim;

(f) causing psychological abuse which includes emotional injury to the victim;

(g) causing the victim to suffer delusions by using any intoxicating substance or any substance without the victim's consent or if consent is given, the consent was unlawfully obtained; or

(h) in the case where the victim is a child, causing the victim to suffer delusions by using any intoxicating substance or any other substance.

[4] Thus domestic violence is violence, physical or psychological, against any member of the family and is not confined to husband and wife. At the hearing of this appeal on 14 May 2015, the respondent was present but the appellant was not as according to learned counsel, she was and still is traumatised by the incident. Learned counsel requested that the appeal be heard in her absence. The respondent had no objection. So we proceeded to hear the appeal in the absence of the appellant. Having heard arguments, we reserved judgment as we needed time to consider the issues raised by the parties. We have now reached a unanimous decision and this is our judgment.

The Background Facts

[5] The material facts relevant to the issues are these. The appellant and the respondent were in the process of a divorce and living together at their matrimonial home at the time the IPO was issued but were already divorced at the time this appeal came up for hearing. A *decree nisi* was ordered by the High Court on 26 November 2014 and made absolute on 26 February 2015.

[6] We were told by learned counsel for the respondent that the learned Judicial Commissioner who heard the divorce petition found the appellant to be 60% responsible for the breakdown of the marriage. Following the divorce, the appellant vacated the matrimonial home on 25 March 2015 and has since been living separately from the respondent.

Whether Appeal Academic

[7] It was argued that since the parties are now divorced and living separately, the appellant does not need further protection and the DVA does not apply any more. It was urged upon us not to waste our time hearing the appeal as the matter has become purely academic. Nevertheless we proceeded to hear full argument from both sides.

[8] We have also allowed, upon request, counsel holding watching brief for the Malaysian Bar and counsel watching brief for several NGOs for women including Sisters in Islam to address the court. It is a healthy display of women solidarity we must say. The Attorney General also held a watching brief and was represented by a Deputy Public Prosecutor.

[9] The record shows that at the case management, the Deputy Public Prosecutor was directed by the Deputy Registrar to file an affidavit to confirm certain material facts pertaining to this appeal but apparently this was not done. We therefore do not have the benefit of the Deputy Public Prosecutor's assistance in confirming the actual status of the police investigation against the respondent.

[10] The principle is that the Court of Appeal should not be used to answer academic questions: See *Howard v. Pickford Tool Co Ltd* [1951] 1 KB 417 cited with approval by the Federal Court in *Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor* [1978] 1 MLRA 504. The IPO that was granted to the appellant was issued pursuant to s. 4(1) of the DVA which stipulates as follows:

> 4. (1) The Court may, during the pendency of investigations relating to the commission of an offence involving domestic violence, issue an interim protection order prohibiting the person against whom the order is made from using domestic violence against his or her spouse or former spouse or a child or an incapacitated adult or any other member of the family, as the case may be, as specified in the order.

[11] The word 'court' in this provision refers to the Magistrates Court, being the court having jurisdiction to try the actual offence alleged against the perpetrator of the domestic violence (see s. 2). This is of course on the assumption that the police have classified the report under s. 321 of the Penal Code.

[12] There is no ambiguity in s. 4(1). It empowers the court to issue an IPO against either the husband or the wife to prevent him or her from using domestic violence against his or her spouse or his or her former spouse or a child or an incapacitated adult or any other member of the family.

[13] Given the clear ambit of s. 4(1), which includes a 'former spouse', it is incorrect to say that the IPO only subsists in a subsisting marriage. An IPO can still be in force even where the parties are divorced and living separately. We therefore reject the respondent's argument that since the marriage between the appellant and the respondent had come to an end, this appeal has become academic.

Whether Magistrate Can Set Aside IPO

[14] We take note of the fact that an IPO, as the term implies, is a temporary order which by virtue of s. 4(4) automatically ceases to have effect in either of the following two circumstances, that is to say:

A (a) upon completion of the investigations; or

(b) when a criminal proceeding relating to the commission of an offence involving domestic violence is instituted against the person against whom the order is made.

B **[15]** It was contended by learned counsel for the appellant that since neither of these two events had occurred, the learned Magistrate's decision to set aside the IPO was *ultra vires* s. 4(4) of the DVA. What learned counsel is saying in effect is that so long as the police investigation has not been completed and neither has any criminal proceedings been instituted against the respondent, the IPO remains in force and the court is powerless to set it aside.

[16] Learned counsel for the respondent contended otherwise. It was submitted that the learned Magistrate had full authority to set aside the IPO as s. 12B of the DVA empowered her to do so. Section 12B provides as follows:

D 12B. The person against whom an interim protection order is made may apply to set aside the order within fourteen days from the date the order is served.

[17] We are inclined to agree with the respondent. The fallacy of the appellant's argument lies in the fact that it assumes that only in the two E circumstances falling under sub-s. 4(4) could an IPO be set aside. Both sub-s. 4(4) and s. 12B it will be noted are relatively new provisions having been inserted simultaneously *vide* Act A1414 which came into force on 20 February 2012.

F **[18]** The purpose behind these two provisions must be properly understood. Sub-section 4(4) sets out the circumstances in which an IPO ceases to have effect. Section 12B on the other hand provides the mechanism for the person against whom an IPO was issued to apply, within 14 days of the service of the order, to set it aside.

G **[19]** These two provisions are unrelated and must not be read in one breadth. Section 12B stands on its own and is not subjugated to sub-s. 4(4). There is nothing in s. 12B that can be construed as prohibiting an application to be made, and for the court to make the order sought, during the pendency of a police investigation. In fact, the application can be made immediately upon service of the IPO. To accede to the construction advocated by learned H counsel for the appellant would be to render the provisions of s. 12B completely otiose. That cannot be the result intended by Parliament when it enacted the provision.

The Question For Determination

I **[20]** On the facts of the present case, we are of the view that the question is not whether the learned Magistrate had power to set aside the IPO but whether this was a fit and proper case for the court to make such order and this includes the preliminary question of whether the application should be struck out *in limine* for being filed out of time.

Whether Respondent's Application Out Of Time

[21] We shall first deal with the issue of time lapse. There is no dispute that the IPO was served on the respondent on 24 September 2012 but the application to set aside was only made on 11 December 2012. The respondent was therefore two months and 18 days out of time. He had however given his explanation for the delay and his explanation was that he had wrongly filed the application in the High Court instead of the Magistrates Court (see para. 17 of his affidavit in support affirmed on 5 November 2012).

[22] The appellant does not deny that this was the reason for the delay but pointed out that the respondent's application to the Magistrates Court after the botched High Court application was still out of time and no application for extension of time was applied for nor granted by the court. It was submitted that the delay was fatal and the application for setting aside should have been dismissed outright by the learned Magistrate without hearing the merits of the application.

[23] We cannot subscribe to the learned counsel's proposition. We do however agree with her that an explanation must be given for the delay and an application for extension of time must be made by the respondent. But the fact is the respondent had already done that, ie, explaining the delay, and this was done by way of an affidavit and the learned Magistrate accepted his explanation. It was entirely for the learned Magistrate to decide whether to accept or to reject the explanation and we have no reason to interfere with that decision.

[24] Clearly therefore it was not wrong for the learned Magistrate to entertain the application although it was filed out of time. In any event the respondent had, by para. 1 of the notice of application, prayed for an order that he be granted leave to file the application. By proceeding to hear the application to its final conclusion, the learned Magistrate must have granted the respondent abridgement of time to file the application. In the circumstances, we see no merit in the appellant's contention that the learned Magistrate had erred in failing to take into account the respondent's failure to file the application within 14 days after service of the IPO.

Whether Proper Case For Setting Aside

[25] Now the merits of the matter. In an application to set aside an IPO under s. 12B of the DVA, a Magistrate is vested with wide discretion whether to allow or to disallow the application. The only fetter to the discretion is that it must be exercised judiciously and based on the material before the court. In the present case, the respondent's application was supported by his affidavit in which he averred, amongst others, to the following facts:

(a) that the police report lodged by the appellant was false and was lodged for the purpose of evicting him from the matrimonial home and to prop up her claim for the entire matrimonial property in the divorce petition filed by the respondent.

(b) the IPO obtained by the appellant was intended to shame him.

(c) that the appellant is a cruel woman and had a violent temper.

(d) that the appellant had on several occasions threatened to injure him.

[26] These averments of fact were traversed by the appellant in her affidavit in opposition but it is not clear from the grounds of judgment if any of those grounds found favour with the learned Magistrate. What is clear however is that she gave two reasons for setting aside the IPO, firstly it was unfair to keep the respondent waiting for the completion of the police investigation and secondly the appellant could avoid injury as she was living separately from the respondent.

[27] There can be no hard and fast rule as to what in law amounts to a valid reason in an application for setting aside under s. 12B but we must say at the outset that the second reason given by the learned Magistrate cannot be a valid reason and is irrelevant in considering whether the IPO should be set aside. We say so simply because a person can still commit an act of domestic violence against his or her former spouse even after divorce. This is not something that is unusual in our society or any society for that matter. Parliament in its wisdom must have taken this into contemplation when enacting s. 4(1) by including within its ambit a 'former spouse'.

[28] As for the first reason given by the learned Magistrate, she noted that as of the date of hearing, there was still no news of the outcome of the police investigation. This prompted her to make the following remarks:

> Adalah tidak adil kepada suami menunggu dan terus menunggu dengan IPO terbeban dibahunya. Mahkamah berpendapat, penyiasatan kes dibawah Sek. 323 KK tidak perlu mengambil masa yang lama sekiranya laporan polis yang dibuat oleh pemohon adalah sesuatu yang benar dan tidak diada-adakan. Laporan perubatan sepatutnya dapat diperolehi dalam tempoh 1 bulan dari tarikh pemohon ke hospital/klinik untuk mendapatkan rawatan bagi kecederaan yang dialami seperti yang didakwa dalam laporan polis tersebut.

[29] It was contended that the learned Magistrate had fallen into error in placing on the appellant the burden of producing the medical report and of ensuring that the police investigation was completed. It was pointed out that since the police investigation and its progress were not within the purview of the appellant, it was wrong to take away the IPO due to no fault of hers.

[30] There is force to the argument but in our view the matter must also be looked at from the respondent's perspective. If the police investigation and its progress were not within the purview of the appellant, neither were they within the purview of the respondent. As between the two competing interests, we would think that it is the respondent rather than the appellant who will be adversely affected by the delay in the police investigation. It will be unfair in the circumstances to allow the appellant to benefit from the delay.

[31] An IPO by its very nature carries with it a stigma that the person against whom the order is made is a violent person although the truth or otherwise of the police report leading to its issuance has yet to be established. The present case is a good example of how an IPO can cause injustice to the person against whom it is issued. The police report was lodged by the appellant on 30 August 2012. Yet eight months later when the case came up for hearing before the learned Magistrate on 30 April 2013, there was still no news of the outcome of the police investigation.

[32] In fact it had not been shown to the learned Magistrate nor to the learned High Court Judge that the police had in fact carried out any investigation into the report and if so what was the stage of the investigation. Before us learned counsel for the appellant could only come up with a bare statement from the bar table that there is 'no evidence' that the police investigation has been completed.

[33] We fail to understand why it was so difficult for the appellant to find out from the police if the investigation had been completed or to at least update the court of its progress. As the complainant, she had every right to obtain such information, more so when the information was required for the purpose of the present proceedings, unless she took the position that it was not in her interest to obtain such information. The respondent does not have the same privilege, being the target of the criminal investigation and a potential accused.

[34] Having given anxious consideration to the matter, we are of the view that it is grossly unfair and oppressive to the respondent to allow the IPO to continue hanging over his head like a sword of Damocles without knowing when it would be lifted. Having regard to the ordinary course of human affairs, it is fair to assume that the respondent has been made to suffer the indignity of being labelled a violent man although there is, as yet, no criminal charge filed against him for the assault allegedly committed in August 2012.

[35] The present appeal proceeded on the basis that the investigation has not been completed, and we are now into the second half of 2015. How much longer, one may ask, will the police take to complete the investigation, if at all any investigation has been carried out? We agree with the learned Magistrate's observation that an investigation into an offence punishable under s. 323 of the Penal Code should not take such a long time to complete if the police report lodged by the appellant contained the truth.

Burden Of Proof

[36] The appellant had posed the question, who bears the burden of proof in a proceeding under s. 12B of the DVA? Apart from the relevant provisions on burden of proof in Chapter VII of the Evidence At 1950, there are two things in particular that we need to keep in mind when considering this question, first the temporary nature of the order and second that the IPO relates to an allegation of criminal conduct by the appellant. It is settled criminal jurisprudence that he who accuses must prove the accusation.

[37] In saying this, we are of course not suggesting that the interest of the respondent takes priority over the interest of the appellant. Obviously a balance has to be struck between the two competing interests. All things said and done and having regard to the fact that the IPO was issued pursuant to an allegation of a criminal conduct by the respondent, and that the respondent had no access to the police investigation to provide proof that the police investigation had been completed within the meaning of s. 4(4), we take the view that the burden is on the appellant to satisfy the court why the interim order should be allowed to remain.

[38] In the present case, neither the medical report nor the affidavit of the medical officer was produced by the appellant to at least give some form of assurance to the learned Magistrate that there was basis to investigate the matter further. The affidavit of the investigating officer could also have been produced by the appellant, not to prove the alleged offence, but for the limited purpose of confirming whether the investigation had been completed and if so whether any recommendation had been made to the Public Prosecutor whether to charge or not to charge the respondent with any offence in connection with the report.

[39] If even that was not possible, the appellant herself could still affirm to those facts in her affidavit after consulting the police. But none of these was done, and the appellant expects the court to assume that the investigation has not been completed.

Whether Integrity Of Police Investigation Compromised

[40] There is evidence that the appellant on her own initiative went to Hospital Raja Permaisuri Bainun, Ipoh to seek treatment four days after lodging the police report and five days after the alleged assault. It has not been explained why the appellant had gone to the hospital by herself and not accompanied by any police officer, given that her police report contained an allegation of a criminal act against the respondent.

[41] We believe the standard operating procedure would be for the police to send a complainant in a physical assault case to the hospital for medical examination and not for the complainant to do so on her own without being accompanied by any police officer.

[42] The reason for this is obvious. A police investigation must not only be independent but must be seen to be independent. The independence and integrity of the investigation will be compromised if a complainant is allowed to gather evidence by herself. In an assault case involving an allegation of physical injury, a medical report prepared by an independent medical officer is crucial evidence to determine if the complainant has indeed suffered any injury, if so how serious is the injury, on which part of the body was the injury inflicted and so on and so forth.

Lifespan Of IPO

[43] As we said, an IPO is a temporary order. It is not meant to be permanent. Even a protection order issued pursuant to s. 5 has a life span of only 12 months unless further extended which period shall not exceed 12 months: See s. 6(2). It cannot be the intention of the Legislature that an IPO should be given a longer life span and that it could only be cut short by the occurrence of either of the two events set out in s. 4(4). In the face of s. 12B such construction will lead to an absolute absurdity.

[44] Learned counsel for the appellant argued that there is no harm in allowing the IPO to remain in force as it merely restrains the respondent from further abusing the appellant and that it in no way deprives him of his rights or interest in the matrimonial home. With due respect, we do not see the relevance of this factor in considering whether the IPO should be set aside or otherwise.

[45] In any event, even without the protection accorded by the IPO, there are other laws that can provide adequate protection to the appellant. One such law is the Penal Code itself. Surely it will be a criminal offence under the Penal Code if the respondent were to commit any violent act or threat of violence against the appellant. If that were to happen, the appellant is at liberty to lodge a fresh police report against the respondent. Not all is lost merely because no IPO is in place. The sad reality is that if a person is violent by nature, he will still commit domestic violence irregardless, with or without an IPO.

Whether Proper Parties Before The Court

[46] Learned counsel for the appellant posed the questions: Who are the proper parties to an application to set aside an IPO? Ought the application be served on the police, the Public Prosecutor and the Social Welfare Officer? Should they be made parties? The DVA unfortunately is silent on the procedure with regard to these matters.

[47] In our view, since a proceeding under s. 12B is strictly a private matter between two private individuals in a domestic dispute, there is no necessity to name and bring in as parties those others mentioned by learned counsel, even if it is only to give the other side notice of the application. But if any other party wishes to take part in the proceedings, it is up to the party concerned to apply for a joinder. We do not think it is the duty of the applicant to do so. All that he is interested in is to have the order set aside.

[48] It is true that in the present case the application for the IPO was made by the Social Welfare Officer but it was done on the appellant's instruction and on her behalf and for her benefit. If at all the Social Welfare Officer must be made a party, it is for such officer to apply to be joined as a party.

A **Whether IPO Application To Be Heard *Inter Partes***

[49] The respondent on his part raised the point that the appellant should have applied for the hearing in the Magistrates Court to be made *inter partes* and that her failure to do so had prejudiced him in that he was given no opportunity to ventilate his case before the IPO was extended beyond
B 21 days. It was submitted that since an IPO is a form of interim injunction obtained by way of an *ex parte* application, O. 29(2B) and O. 29(2BA) of the Rules of Court 2012 ("the Rules") would take effect. We reproduce below O. 29(2B) and O. 29(2BA):

C **Order 29(2B)**

> Unless earlier revoked or set aside, an interim injunction obtained on *ex parte* application shall automatically lapse twenty one days from the date it was granted.

Order 29(2BA)

D

> An *ex parte* injunction must be served within seven days of the date of the order, and the Court granting the order must fix a date to hear the application *inter partes* within fourteen days from the date of the order.

[50] There are no equivalent provisions in the DVA but O. 1 r. 2(2) of the Rules expressly provides as follows:

E

> (2) These Rules do not have effect in relation to proceedings in respect of which rules have been made or maybe made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.

F **[51]** In the light of this provision, we agree with learned counsel for the appellant that O. 29 of the Rules has no application. The procedure has been prescribed by the DVA itself, s. 4(1) for the grant of the IPO and s. 12B for the setting aside of the order. Whilst we agree that O. 29 of the Rules does not apply, there appears to be a *lacuna* in the law as to what happens to an IPO if it is not set aside.

G

[52] There is no provision in the DVA to prescribe its life span unlike O. 29(2B) of the Rules which stipulates that an interim injunction order obtained on *ex parte* application automatically lapses twenty one days from the date it was granted unless earlier revoked or set aside.

H **[53]** An IPO once issued must be served personally on the person named in the order and will only take effect upon proper service. Once served, the person against whom the order is issued can then apply to set it aside within 14 days of service. To our mind this procedure provides effective safeguard against abuse of s. 4(1). For all practical purposes it is similar to the safeguard
I provided by O. 29(2BA) of the Rules except that it is for the person against whom the order is issued to make the application to set it aside.

[54] Since the safeguard is already in place, we do not see how the appellant's failure to apply for the hearing in the Magistrates Court to be made *inter partes* had prejudiced the respondent. The truth of the matter is, after being served with the IPO, the respondent applied to have the order set aside and in fact succeeded both in the Magistrates Court and in the High Court. Thus no prejudice whatsoever had been occasioned by the appellant's failure to apply for the hearing to be made *inter partes*. The point raised by the respondent is therefore without substance.

Whether Appellant To Pay Costs In The High Court

[55] Lastly, counsel for the appellant questioned why costs in the sum of RM600 should be awarded against the appellant by the High Court after dismissing her appeal. Again this is a matter of discretion and we shall say no more.

Summation And Conclusion

[56] To recapitulate, the law allows for an IPO to be set aside on application and in this case the learned Magistrate after considering the respondent's application and the appellant's opposition thereto decided that the IPO should be set aside. It is not for us sitting in our appellate jurisdiction to differ from the learned Magistrate unless it can be shown that the way in which she exercised the discretion was manifestly wrong: *Eng Mee Yong & Ors v. V Letchumanan* [1979] 2 MLJ 212 Privy Council.

[57] We are not convinced that the learned Magistrate had erred in the exercise of her discretion. Her error in finding that the IPO was no longer needed because the appellant could avoid injury as she was living separately from the respondent is not such a manifest error as to render the whole of her judgment defective and liable to be set aside. Nor do we think the learned High Court Judge was wrong in affirming her decision.

[58] For all the reasons aforesaid, we are unanimous in finding that there is no merit in the appellant's appeal. Accordingly, the appeal is dismissed with costs. We shall now proceed to hear the parties on costs.

After hearing arguments, we make no order as to costs.